

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1366

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

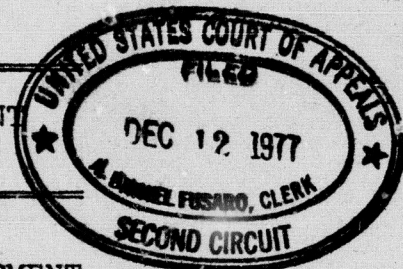
-against-

GJERDJ KALAJ and
LAWRENCE MORICI,

Defendants-Appellants.

Docket No. 77-1366

BRIEF FOR APPELLANT
LAWRENCE MORICI



ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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QUESTIONS PRESENTED

1. Whether the district court's failure to instruct the jurors that they were required to find that appellant Morici knew he was transporting firearms eliminated the required element of knowledge from the crime charged.
2. Whether the failure to require co-defendant Johnson to testify or to permit evidence about his statements which were exculpatory to appellant Morici requires reversal.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Henry F. Werker) rendered on July 28, 1977, after a jury trial, convicting appellant Lawrence Morici of conspiring to transfer firearms in violation of 26 U.S.C. §§5811, 5812, 5861(d)(e)(i) (Count One) (18 U.S.C. §371).

Appellant Morici was sentenced as a Young Adult Offender pursuant to 18 U.S.C. §4216 and §5010(a). Imposition of the prison sentence was suspended and appellant was placed on probation for three years and fined \$2,000.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

A. The Indictment*

On February 18, 1977, an indictment was filed charging appellant Morici and co-defendants Gjerdj Kalaj and James

*The indictment is reproduced as "B" to the separate appendix to the brief of appellant Morici.

Johnson with conspiring to violate the transfer and registration provisions of the Federal firearms laws (26 U.S.C. §§5811, 5812, 5861(d)(e)(i) (Count One)).*

B. The Openings and the Government's Case

The Government's theory was that appellant Morici and co-defendants Kalaj and Johnson agreed to sell 100 pen guns to undercover agent Mathew Raffa (28**). In its opening, the defense conceded that appellant had supplied Johnson with the objects which were the subject of the conspiracy count. However, appellant contended that what he sold were tear gas pen guns and that he believed that they were capable of firing only tear gas -- not bullets -- and that subsequent to his transfer, the tear gas guns had been altered to permit a change in their use (36).

*The indictment also charged co-defendants Kalaj and Johnson with substantive violations of the firearms laws (Kalaj: Counts Two, Three, Four, and Five; Johnson: Counts Seven and Eight).

Prior to trial, co-defendant Johnson entered a guilty plea to Count One of the indictment, and was therefore not tried with appellant Morici. At the plea proceedings, the Government agreed to dismiss Counts Seven and Eight, the counts charging Johnson with possession on December 21, 1976, of one pen gun during the commission of a felony (Count Seven) and possessing on the same day three pens not identified by a serial number (Count Eight). On July 19, 1977, at Johnson's sentencing proceeding, these counts were dismissed.

**Numerals in parentheses refer to pages of the trial transcript. Numerals preceded by "GX" refer to the Government's exhibits in evidence. Numerals preceded by "DX" refer to defense exhibits in evidence.

Alcohol, Tobacco, and Firearms Agent Raffa testified that on December 2, 1976, he met co-defendant Kalaj at the Armory Real Estate office in the Bronx, New York, Kalaj's place of business, and arranged for the purchase of 40 pen guns from the co-defendant (68-74, 161, 167, 172). After several telephone conversations (79-80), on December 7, Raffa increased his order to 100 pen guns (80-82). Two weeks later, on December 21, 1976, at approximately 2:00 p.m., Raffa returned to Kalaj's real estate office to consummate the deal.* After Raffa's arrival, Kalaj left the office to pick up the guns, returning a short time later (100, 102, 174). Raffa and Kalaj walked to Kalaj's car, from which Kalaj retrieved a box containing 100 pen guns (104, 178-179). Kalaj and Raffa then went to the agent's car. Inside the car, the agent was given the box of pen guns (which were admitted into evidence as GX-1-100), whereupon Kalaj was arrested (104-106).** Raffa testified that the box he was given had previously been opened (112).

Co-defendant Johnson was arrested contemporaneously with co-defendant Kalaj, and was transported to the offices of the Bureau of Alcohol, Tobacco, and Firearms. Johnson, who supplied the guns to Kalaj, agreed to cooperate with the agents,

*Raffa testified that from December 7 through December 21, he and Kalaj had numerous telephone conversations pertaining to the sale (83-90).

**As a result of the search pursuant to Kalaj's arrest, a loaded pistol was recovered from Kalaj (107). This gun was the subject of Count Five of the indictment.

and later that afternoon telephoned appellant Morici in an attempt to arrange another deal for 100 pen guns between appellant and Agent Raffa (125-130).*

Pursuant to these arrangements, Raffa drove to 77th Street and 17th Avenue in Brooklyn, where he met appellant Morici. Appellant got into the agent's car. After a conversation relating to the proposed sale, appellant asked to be paid for the deal involving the co-defendants.** In response, Raffa gave appellant \$300 (141-143, 145). Thereafter, appellant left the car, returning approximately two hours later. After appellant indicated that he was unable to arrange for the contemplated sale, he was arrested, handcuffed, and frisked (147-149). No weapons were found on appellant (188, 277).

Appellant was then transported to the agent's office, where he said that the \$300 found in his pockets was his own money.***

*These telephone calls were taped, entered into evidence (GX-7, 8), and played for the jurors (132, 134). The conversations indicated that appellant had not yet been paid for his part in the sale to Raffa and that appellant agreed to meet with Raffa on the evening of December 21, 1976 (GX-7, 8; 233).

**According to Raffa, appellant said he could also supply automatic weapons (142, 148). This testimony was not recorded in any of the agent's reports (214, 225).

***After questioning by the agents, appellant stated that he did not know anything about guns and that he was in the business of selling jeans, not guns (156, 335). Agent Raffa testified that these statements indicated to him appellant's desire not to talk about the events in question (237).

On cross-examination, Agent Raffa revealed that the agent who prepared his report, Agent Dugan, referred to the guns involved as "tear gas pen guns" (258-259).*

Agent Gunnar Erickson testified that he test-fired 10 of the weapons sold to Agent Raffa and found that they were capable of discharging a shot through the energy of an explosive, as well as of expelling tear gas (307-309, 317, 320-321, 348). Further, Erickson indicated that the space between the "cartridge" or "bullet" and the barrel of the pen guns was "close," and because of that fact, the guns would be unable to fire certain calibers of shot (337). Erickson explained further that if the opening of the barrel were too small, the gun would explode (349, 350). Moreover, the agent stated that, in his opinion, a tear gas pen gun incapable of firing a projectile would not be subject to the requirements set forth in 26 U.S.C. §5801 et seq. (342-343).**

During cross-examination, three barrels having smaller apertures than the barrels of the pen guns which were the subject of the indictment, were admitted into evidence (DX-E-1, E-2, E-3). Erickson unscrewed the barrel of one of the Government's

*Raffa's description of the events that occurred on December 21, 1976, was corroborated by several surveillance agents (2-6, 8-9, 16-19, 23-24, 36, 42, 56, 281-282, 292-296, 299, 332-333, 361-364, 366-367).

**The testimony showed that a pen gun consists of an upper portion and a lower portion, or barrel, from which the projectile is actually fired.

pen guns in evidence, replacing it with one of the defense exhibits. The agent explained that the device would be capable of shooting tear gas and could be converted quickly into a weapon similar to those sold to Agent Raffa (i.e., GX-1-100; 353-354).

Charles Baugham, an employee of the Bureau of Alcohol, Tobacco, and Firearms in Washington, D.C., testified that there was no record of appellant Morici's registering any firearms or applying to transfer any weapons or paying any transfer tax (375-376). However, Baugham also explained that the various provisions relating to registration, transfer, and tax would not apply to tear gas pen guns incapable of firing a projectile (379).

C. Co-Defendant Johnson's Exculpatory Testimony
Relating to Appellant Morici

After the close of the Government's case, defense counsel requested a ruling as to whether the co-defendant Johnson, who had entered a guilty plea to Count One of the indictment but had not yet been sentenced, would be allowed to plead the Fifth Amendment if called as a witness by the defense. Defense counsel stated:

Our position is that the defendant Johnson could be forced to testify in view of the fact that he cannot incriminate himself, that he has waived it by pleading guilty, and the understanding is that the two

remaining counts will be dismissed.

(382).*

The Assistant U.S. Attorney confirmed that during the week preceding trial, pursuant to the Government's obligations under Brady v. Maryland, she had disclosed to appellant's counsel that Johnson had told her that appellant Morici had referred to the objects in question as tear gas guns and had offered to supply tear gas shells for them (393-394, 381). The prosecutor explained that because she believed Johnson was lying, the Government would not call him as a witness as part of its direct case (388, 395, 598). However, the Assistant U.S. Attorney indicated that the Government had served a sub poena on Johnson as a possible rebuttal witness, and had requested from the authorities in Washington permission to seek an order of testimonial use immunity (380-381). The district judge ruled that he would respect Johnson's assertion of his Fifth Amendment privilege (382-383, 394) and denied the defense request for a continuance pending the Government's decision on the grant of immunity (396-398).

A hearing was then held outside the jurors' presence, at which Johnson indicated that he would, in fact, claim his Fifth Amendment privilege (407). The district court respected this assertion of the privilege, and denied defense motions for a

*The Assistant U.S. Attorney indicated that the Government had agreed not to oppose a motion to dismiss the open counts (384).

mistrial and dismissal of the indictment on the ground that the court could not compel the Government to apply for a grant of immunity (408).*

In light of its inability to call Johnson as a witness, the defense then requested that the district judge advise the jurors about the exculpatory statements relating to appellant Morici, contending that the failure to present this evidence was fundamentally unfair** and a violation of Brady v. Maryland (409-410, 413):

[The statements] may be believable or not but [they are] exculpatory and the jury has a right to know it, and if the government chooses not to call [Johnson] I don't think they can prevent or should be able to prevent the jury from knowing such testimony.

(411).

While "sympathetic," the district court denied the application (412).

Four days later, in the course of a side-bar, the Assistant U.S. Attorney revealed that the Justice Department had given the U.S. Attorney's office for the Southern District of New York permission to seek an order granting immunity to Johnson:

Washington has given my office permission to seek immunity. I have not at this point

*The district court relied on Cerda v. United States, 488 F.2d 720, 723 (9th Cir. 1973).

**Counsel argued that the Government's failure to grant Johnson use immunity in light of its previous promise not to oppose dismissal of the two open counts in the indictment was an election by the Government to keep Johnson's exculpatory evidence from the jury (415).

sought immunity and I would like the record to be perfectly clear on that.

(596).

Defense counsel then renewed his prior application that the Government be compelled to immunize Johnson (596), on the ground that the Government was improperly preventing the defense from presenting critical evidence, especially in light of the fact that the co-defendant had pleaded guilty and the Government's agreement to dismiss the open counts of the indictment (596-597). The district court denied this application, ruling that the Government has "the discretion as to applying for immunity. The court cannot do it sua sponte. If it would be possible for me to do it sua sponte, I would do it" (598). Further, the district judge precluded counsel from commenting on Johnson's absence (598).

*The theory of the defense of co-defendant Kalaj was that he had been entrapped into supplying the undercover agent with pen guns. In support of this claim, Kalaj testified in his own behalf, and also presented three other witnesses to corroborate his version of the events. These witnesses testified, inter alia, that Kalaj had been employed as a building superintendent (435, 451). Kalaj denied that he had drilled out the barrels of pen guns (583), but admitted that he owned an electric drill (576-577). Kalaj stated that he did not know whether Johnson had drilled out the bores (583). Further, Kalaj indicated that Johnson supplied him with the pen guns sold to Raffa; that Kalaj saw appellant Morici only once when the co-defendant Johnson went to Brooklyn on December 20, 1976 (511-513), and that Kalaj never talked or conversed with appellant Morici (530-531).

D. The Defense Case*

Appellant Morici testified in his own behalf,** stating that the objects sold to co-defendant Johnson were similar to those purchased by Agent Raffa (GX-1-100) except that "the front, the barrel part" that he supplied had smaller openings (604-605, 633). Further, Morici testified that the barrels admitted into evidence as DX-E-1, E-2, and E-3 were identical to those given to Johnson (665); that he believed he was selling only tear gas pen guns (606) which could emit only tear gas (611, 651), and that he would never have become involved if he thought the pens guns were capable of firing a bullet (676). Moreover, appellant stated that he had sold tear gas guns to Johnson twice prior to the December 21 transaction, and that in his dealings appellant generally referred to the objects as "tear gas guns" or "tear gas pen guns" (606-607).* Appellant also admitted selling tear gas guns, which he believed to be legal, to a number of friends (608-610), one of whom indicated that when he had attempted to fire a .22 caliber shell from it, the tear gas gun exploded (610, 650). Further,

*Appellant Morici, who was 23 years old, stated that he was a high school graduate; that he had served in, and had been honorably discharged from, the Army; and that he had never before been arrested (601-603).

**Appellant Morici stated that, as a shorthand description, he would refer to the tear gas guns simply as "pens" or "guns," and explained that he had used such terms in his recorded conversation with co-defendant Johnson (621).

Morici stated that he would supply tear gas cartridges along with the pen guns (612),* and did not know that the sale of tear gas cylinders was illegal in New York City (652).**

After appellant Morici testified, defense counsel renewed his previous application to call the Assistant U.S. Attorney as a witness so that she could testify as to Johnson's post-arrest statements which were exculpatory to appellant. Defense counsel argued that, pursuant to Rule 804(b)(3) of the Federal Rules of Evidence, the statements were admissible as declarations against penal interest. The district court ruled against the motion, relying on this Court's decision in United States v. Guillette, 547 F.2d 745, 754 (2d Cir. 1976).***

*Appellant Morici stated that he also purchased blue jeans for resale from the person who supplied him with tear gas guns (613-614). He admitted that after his arrest he told the agents that he did not know about guns and was only selling blue jeans, and explained that he made these statements to terminate the agents' persistent questioning (631). Further, appellant Morici denied discussing any other types of weapons (627), and told the agents that the \$300 was his money because he "felt it was. I still had to pay John [the supplier] the \$200 and the other \$100 would have been mine" (630, 675).

**Over defense objections as to relevancy (695), the district judge took judicial notice that the New York City Administrative Code requires a permit for the possession of a tear gas gun and that only a police officer may obtain ammunition for such guns (696). Judge Werker did not mention, however, that tear gas guns are not covered by the New York State Penal Code (729).

***In his oral opinion, Judge Werker discussed the various factors set forth in Guillette, repeating his previously expressed position that if he could grant Johnson immunity, he would do so (689). The oral decision of Judge Werker is reproduced as "D" to the separate appendix to the brief of appellant Morici (688-692).

E. Rebuttal

On rebuttal, the Government recalled Agent Erickson, who had affixed one of the barrels admitted as part of the defense case to the body of one of the pen guns supplied to Agent Raffa and test-fired it (697). After narrowing the diameter of the first bullet (701) to exert less pressure on the barrel and "to make sure it was going to be operative" (708), the agent fired the gun two more times, finding that it was capable of discharging a shot through the energy of an explosive (697-701). The agent indicated that the weapon would also be operable with a tear gas cartridge (711).

Lawrence Gorman, a retired detective of the ballistics section of the New York City Police Department, testified as part of appellant Morici's rebuttal case. He testified that it would be extremely dangerous to fire a .22 caliber bullet from the barrel of DX-E-1, E-2, or E-3 -- that the barrel would eventually fracture and explode, but could safely be used to expel tear gas from a tear gas cartridge (732-736).

F. The Summations

After reviewing appellant Morici's testimony and arguing that it should be disbelieved, the Assistant U.S. Attorney stated:

Suppose for a minute you believe him and that the barrels were different. What does that mean? You know from Agent Erickson that they will fire a regular .22 shot....

You also know from Mr. Gorman that they are probably going to be able to fire a shot cartridge, something with multiple shot....

His Honor will tell you about this. Listen to him when he tells you about that. What if Mr. Morici did have the smaller barrels but you know the barrels really will fire a .22, how does that affect him as a matter of law?

(760).

This argument was repeated on rebuttal (804).

In accord with the defense theory, defense counsel argued that when appellant Morici sold the 100 guns which were the subject of the conspiracy charge, the barrels had smaller apertures and appellant did not know that they might be capable of firing anything other than tear gas:

As far as he was concerned, he had no idea that these things might have been capable under some circumstances to shoot some form of bullet.

(778).

G. The Court's Charge to the Jury*

Appellant Morici requested that the district judge submit the defense theory to the jurors for their consideration (see Record on Appeal, Document #8). Specifically, he asked the judge to tell the jurors that if they had "a reasonable doubt that what [appellant Morici] sold, transferred or delivered were then capable of firing .22 calibre bullets, or if [they

*The complete text of Judge Werker's charge to the jury is reproduced as "C" to the separate appendix to the brief for appellant Morici.

had] a reasonable doubt that Lawrence Morici had knowledge that they were then capable of firing .22 calibre bullets, then [the jurors] must find Lawrence Morici not guilty of conspiracy under Count I of the indictment."* Over defense objection, the district court refused to give this instruction (724-725, 727, 739-740).

After reading 18 U.S.C. §371 and the indictment to the jurors, the district court instructed them that they were required to find the following elements to convict on the con-

*Defendant's Request No. 5 reads as follows:

REQUEST NO. 5

Membership in a Conspiracy -
Specific Questions re Lawrence Morici

If you find that the government has proven beyond a reasonable doubt that the conspiracy charged in Count 1 of the indictment existed, then in determining whether the defendant Lawrence Morici was a member of that conspiracy, I charge you as follows:

If the government has proven beyond a reasonable doubt that on or about December 20, 1976, Lawrence Morici sold, transferred or delivered approximately 100 .22 calibre pen guns capable of firing a .22 calibre bullet, with knowledge that such pen guns were then capable of firing a .22 calibre bullet, then you must find the defendant, Lawrence Morici, guilty of conspiracy under Count 1 of the indictment.

If you have a reasonable doubt that what he sold, transferred or delivered were then capable of firing .22 calibre bullets, or if you have a reasonable doubt that Lawrence Morici had knowledge that they were then capable of firing .22 calibre bullets, then you must find Lawrence Morici not guilty of conspiracy under Count 1 of the indictment.

spiracy count:

First, that at sometime during the period from on or about November 20, 1976, through December 31, 1976, in the Southern District of New York an agreement existed among the named defendants and others, or between any two such persons.

Second, that it was the object of this agreement for the defendants to unlawfully transfer firearms without having filed a written application to do so, without having paid the required transfer tax, and without approval of the Secretary of the Treasury or his delegate or to unlawfully receive or possess a firearm not identified by a serial number, or for each of them to receive and possess a firearm not then registered to him in the National Firearms Registration and Transfer Record.

Third: That the defendant knowingly associated himself with the conspiracy and participated in it.

Fourth: That one of the conspirators, not necessarily a defendant, knowingly committed at least one of the overt acts set forth in the indictment at or about the time and place alleged.

As to the essential element of knowledge, the district judge explained that the defendant had to join the conspiracy with knowledge of at least some of its unlawful purposes (824-825). Further, over defense objection that scienter was required for conviction of a firearms conspiracy (726, 860), the district court stated:*

Let me also caution you that you do not have to find before you may consider a partic-

*Defense counsel argued that even if specific knowledge of the violation of the federal firearms laws is not required for conviction on a substantive charge, such knowledge is still required for conviction of conspiracy (726-728).

particular defendant a member of the conspiracy that he knew that the basic purposes and objectives of the conspiracy constituted a violation of federal law, nor do you have to find that the acts which constituted his participation in the conspiracy were themselves substantive violations of the law.

Moreover, the district court did not define the meaning of firearms for the purpose of the conspiracy count. However, in connection with Count Two -- one of the substantive violations involving Kalaj, the jurors were told that a firearm was "any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive" (832). The judge also failed to instruct the jurors that before they could convict appellant Morici of conspiracy, they first had to find that appellant knew that what he agreed to transfer were, in fact, firearms. However, the judge did tell the jurors, over defense objections (860-861), that they were not to draw any inference from Johnson's failure to testify, "for he was not available to counsel for either side" (851).

After deliberations and the re-reading of testimony, the jury found appellant Morici guilty of conspiracy, as charged.

ARGUMENT

Point I

THE DISTRICT COURT'S FAILURE TO INSTRUCT THE JURORS THAT THEY WERE REQUIRED TO FIND THAT APPELLANT MORICI KNEW HE WAS TRANSPORTING FIREARMS ELIMINATED THE REQUIRED ELEMENT OF KNOWLEDGE FROM THE CRIME CHARGED.

Throughout the proceedings below, appellant Morici contended that he did not have the requisite knowledge to commit the crime charged. Specifically, appellant stated that he believed that the objects transferred to Johnson were tear gas guns, capable of emitting only that gas. In accord with this theory, trial counsel submitted a request to charge that if the jurors had a reasonable doubt as to whether appellant had knowledge that what was transferred was then capable of firing a bullet, they were required to acquit. Once the Government showed that a weapon similar to that transferred by appellant had in fact fired a bullet, the district court rejected the instruction, as well as the defense, on the erroneous ground that appellant's knowledge of the weapon's capabilities was irrelevant to his guilt. This decision allowed the jurors to convict even if appellant was actually innocent of the crime charged.

Appellant Morici was charged with conspiring to violate the federal laws pertaining to the transfer, taxation, and registration of firearms. In order to convict on that offense,

the Government was required to prove, and the jurors to find, that appellant had at least that degree of criminal intent and knowledge necessary for the underlying crime. United States v. Feola, 420 U.S. 680, 696 (1975); see also United States v. Dickerson, 508 F.2d 1216 (2d Cir. 1975); United States v. Crimmins, 123 F.2d 271, 272 (2d Cir. 1941). In United States v. Freed, 401 U.S. 601, 607 (1971), the Supreme Court discussed and implicitly approved prior lower court decisions holding that for conviction of a substantive violation of the pertinent statute, the type of knowledge "required to be proved was knowledge that the instrument possessed was a firearm. See Sipes v. United States, 8 Cir. 321 F.2d 174, 179, and cases cited." Id., 401 U.S. at 607.* See also concurring opinion of Mr. Justice Brennan at 401 U.S. at 614 ("The cases held that a convic-

*In Sipes, in upholding the defendant's conviction for possession of a rifle which was loaded at the time of the defendant's arrest, then Circuit Judge Blackmun wrote:

He [the defendant] said he found it [the gun] and possessed it for several days. It was in his hands when the arresting officers took it from him. He knew it was a gun. His possession was a knowing possession.

United States v. Sipes, 321 F.2d 174, 179 (8th Cir.), cert. denied, 375 U.S. 913. Emphasis added.

Of course Freed, as well as Sipes, held that the accused need not know that the particular firearm in question was actually unregistered under federal law, United States v. Freed, supra, 401 U.S. at 607, or that the rifle was made in violation of the statute, United States v. Sipes, supra, 321 F.2d at 179; see also United States v. Fogarty, 344 F.2d 475, 478 (6th Cir. 1965).

tion of an individual of illegal possession of an unregistered firearm had to be supported by proof that his possession was 'willing and conscious' and that he knew the items possessed were firearms").

The pertinent provision of 26 U.S.C. §5845(e) defines a firearm in the following manner:

... any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive....[*]

"In other words, a tear gas gun capable only of discharging tear gas would not be considered a firearm." United States v. Decker, 292 F.2d 89, 90 (6th Cir. 1961), cert. denied, 368 U.S. 834 (1961). Consequently, in order to convict, it was necessary that appellant Morici know that the instruments he agreed to transfer were firearms; that is, capable of firing a shot. United States v. Freed, supra; United States v. DeBartolo, 482 F.2d 312, 316 (1st Cir. 1973); cf. United States v. Vasquez, 476 F.2d 730, 732 (5th Cir. 1973) (possession of an item which the defendant knew to be a firearm within the general definition of the term required).

Appellant Morici testified that he did not have such knowledge and believed that the objects transferred could emit only tear gas. The district court rejected this defense and did not

*In discussing a predecessor statute of 18 U.S.C. §921 et seq., one district court found that Congress intended to regulate all types of guns except the air gun and the tear gas gun. United States v. Tot, 42 F.Supp. 252, 255 (D.N.J.), affirmed, 131 F.2d 261 (3d Cir.), reversed on other grounds, 319 U.S. 463 (1943).

instruct the jurors about it, on the ground that appellant's knowledge was irrelevant so long as the proof showed that the instruments were, in fact, capable of firing a bullet. This decision and the absence of appropriate instructions eliminated the requisite element of knowledge from the crime charged and requires reversal and a new trial. United States v. Freed, supra.*

In any event, even if it is unnecessary to show knowledge that a firearm is involved to convict of substantive violations of 26 U.S.C. §5801 et seq., and that therefore the defendant's intent or mens rea is not an element of the substantive crime, a higher degree of knowledge or intent is still required to convict of conspiracy.** United States v. Crimmins, supra, 123 F.2d 271. There, this Court explained:

*United States v. Decker, 292 F.2d 89 (6th Cir.), cert. denied, 368 U.S. 834 (1961), is distinguishable since the proof showed that the defendant Cox had previously stated that he had shot a bullet from the weapon. Similarly, United States v. Thomas, 531 F.2d 419 (9th Cir.), cert. denied, 425 U.S. 996 (1976), involved a rifle which was, even on quick examination, apparently capable of firing a shot. To the extent that the reasoning in Thomas is inconsistent with that in United States v. Freed, supra (see dissenting opinion of Judge Hufstedler, 531 F.2d at 423), it should be rejected.

**This question was specifically left unanswered in both United States v. Freed, supra, 401 U.S. at 609 n.14, and United States v. Feola, supra, 420 U.S. at 691.

Ordinarily one is not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal.

Id., 123 F.2d at 272.

As this Court noted in Crimmins, criminal intent has been dispensed with as a necessary element of certain crimes. However,

... it does not follow, because a jury might have found [appellant] guilty of the substantive offense, that they were justified in finding him guilty of a conspiracy to commit it. Courts do indeed say that each conspirator is chargeable with the acts of his fellows done in furtherance of the joint venture; but into that must be read the condition that acts so imputed must be in execution of the venture as all understand it; not indeed in its details, but so far as concerns those terms which constitute the substantive crime. It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding.... While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past. [*]

Id., 123 F.2d at 272-273.

*As the Supreme Court stated in Feola:

The traffic light analogy poses the question whether it is fair to punish parties to an agreement to engage intentionally in apparently innocent conduct where the unintended result of engaging in that conduct is a violation of a criminal statute.

United States v. Feola, supra,
420 U.S. at 691.

The facts of this case involve an analogous situation. Appellant Morici admitted engaging in apparently innocent activity, asserting that he did not know that the instruments transferred were firearms, capable of firing a bullet. The Government's theory of the case, articulated by the district judge in his charge, essentially eliminated this element of mens rea from the conspiracy. Even if this result were permissible for conviction of the substantive offense, it was error here under this Court's decision in Crimmins. Accordingly, reversal of the judgment is required.

Point II

THE FAILURE TO REQUIRE CO-DEFENDANT JOHNSON TO TESTIFY OR TO PERMIT EVIDENCE ABOUT HIS STATEMENTS WHICH WERE EXCULPATORY TO APPELLANT MORICI REQUIRES REVERSAL.

The theory of the defense was that appellant Morici had transferred tear gas pen guns -- not firearms -- to the co-defendant, Johnson. Since appellant admitted dealing directly with Johnson, the co-defendant could provide critical testimony directly relating to appellant's claim of innocence. Defense counsel requested that Johnson be called as a defense witness, asserting that the co-defendant had waived any claim of his Fifth Amendment privilege by his prior guilty plea to the crime. The district court rejected this argument and allowed Johnson to assert the privilege.

At trial, the prosecutor confirmed that Johnson had made exculpatory statements that appellant had referred to the guns involved as tear gas guns and had offered to supply tear gas shells for them. Because of her personal belief that Johnson was lying, the Assistant U.S. Attorney declined to call the co-defendant as a witness, but had, in any event, requested permission from the Justice Department to seek an order of immunity. During trial, it was revealed that the authorities in Washington had given the United States Attorney's office the required authorization. Despite this, the prosecutor persisted in her refusal to ask for an appropriate order, prompt-

ing the defense to request that the Government be required to do so. The district judge repeatedly expressed a desire to accord Johnson use immunity, but believed that he was powerless to do so, and unable to ~~compel~~ the prosecutor to apply for an immunity order. This failure, and the rulings which precluded the jurors from hearing Johnson's statements -- evidence essential to appellant's defense -- improperly allowed the prosecutor to determine the admissibility of such evidence, and requires reversal.

A. The Government's refusal to accord the co-defendant Johnson use immunity was fundamentally unfair and violated appellant Morici's Fifth and Sixth Amendment rights to due process and compulsory process, respectively.

It is basic to any fair determination of guilt or innocence in a criminal trial that the defense be allowed to discover (Brady v. Maryland, 373 U.S. 83 (1963)) and then present to the jurors exculpatory evidence:

Few rights are more fundamental than that of an accused to present witnesses in his own defense.

Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

However, because this right is not absolute (see, e.g., Roviaro v. United States, 353 U.S. 53 (1957)), the propriety of compelling the Government to apply for a grant of use immunity requires

a balancing of competing interests.* As was stated by Chief Judge Bazelon in denying rehearing en banc in United States v. Gaither, 539 F.2d 753, 754 (D.C. Cir. 1976):

The considerations on each side of the question are weighty. On the one hand, criminal defendants obviously have a substantial interest -- one that implicates constitutional values -- in obtaining exculpatory testimony, and the public in assuring that all relevant evidence bearing on guilt or innocence is presented to the fact finder. On the other hand, compelling the Government to grant use immunity may offend separation of powers principles and may jeopardize future prosecutions of the immunized witness since in any future prosecution the Government will have to prove that the immunized testimony was not used.

Id., 539 F.2d at 754.**

See also United States v. Morrison, 535 F.2d 223, 229 (3d Cir. 1976). The facts of this case reflect that the Government's legitimate interests in declining to apply for an order of use immunity (see, e.g., United States v. Alessio, 528 F.2d 1079, 1081-1082 (9th Cir. 1976)) were non-existent here and that the prosecutor's refusal to do so was arbitrary.

*This Court's decision in United States v. Stofsky, 527 F.2d 237, 249 (2d Cir. 1975), is distinguishable on its facts. Further, the issue presented here was not raised by the briefs in that case (see Government's Brief in Stofsky at pp.103-104).

**Judge Bazelon indicated that the question involved was "perhaps" an issue of first impression in the federal courts. United States v. Gaither, supra, 539 F.2d at 754 and n.1; but see Thompson v. Garrison, 516 F.2d 986, 988 (9th Cir. 1975); see Western, Compulsory Process, 73 Mich. L.Rev. 71, 166-170 (1974); Note, A Reexamination of Defense Witness Immunity: A New Use for Kastigar, 10 Harv. J.Legis. 74 (1972). Both commentators conclude that district judges may compel the Government to apply for an order of use immunity.

Here, prior to trial, the potential witness had entered a guilty plea to Count One of the indictment. While he had not yet been sentenced, and two other counts remained "open," the Government had already agreed to their dismissal.* Thus, the granting of testimonial use immunity in this case did not pose the risk of an "immunity bath," see United States v. Morrison, supra, 538 F.2d at 1229, and could not have jeopardized the Government's prosecution of Johnson nor interfered with the Government's discretion to decide whether to prosecute at all -- traditional justifications for denying defense witnesses use immunity. See United States v. Alessio, supra, 528 F.2d at 1079-1080 (quoting United States v. Nixon, 418 U.S. 683 (1974)).

Moreover, the authorities in the Justice Department had already given their permission to apply for the relevant order, reflecting the Government's own determination that its interests were not jeopardized by granting Johnson use immunity. While the prosecutor decided that she would not apply for an order because she did not believe Johnson's version of the events, this determination of the witness' credibility was for the jury,

*If Johnson doubted the ability of Judge Werker, the sentencing judge, to disregard the immunized testimony, he should have requested a different judge for sentencing. United States v. Wilson, 488 F.2d 1231 (2d Cir. 1973), reversed on other grounds, 421 U.S. 309 (1975).

not the prosecutor, to make.*

In addition to due process considerations, appellant's right to present witnesses and to compel the Government to grant use immunity in order to do so is grounded in the Sixth Amendment, which, inter alia, guarantees that

[i]n all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor.

One commentator notes:

The clause guarantees the accused official 'process' for compelling witnesses to appear and testify in his favor. It was adopted to give the defendant at least as much access as that of the prosecution to governmental devices for obtaining testimony in its favor.

Westen, Compulsory Process,
73 Mich. L.Rev. 71, 168 (1974).

While the right to compulsory process might potentially conflict with the Fifth Amendment right against self-incrimination, where, as here, a defense witness asserts the privilege, the grant of use immunity eliminates any conflict, allows both rights to operate freely, and places the parties in the same position as if the witness had actually been allowed to assert the privilege:

We conclude that the immunity provided by 18 U.S.C. §6002 leaves the witness and the prosecutorial authorities in substantially

*Indeed, a prosecutor would necessarily think any exculpatory statement was either mistaken or fabricated since, if believed, the prosecutor would then be duty-bound to move for a judgment of acquittal. In any event, the Government's remedy for false testimony given by Johnson was to prosecute him for perjury, not to prevent him from testifying.

the same position as if the witness had claimed the Fifth Amendment privilege.

Kastigar v. United States,
406 U.S. 441, 462 (1972).

Even if the district court were not required to grant use immunity, the court, at the very least, should have allowed the introduction into evidence of Johnson's post-arrest statements to the Assistant U.S. Attorney that appellant referred to the instruments involved as tear gas guns and had offered to supply tear gas cartridges for them. The full statement, which inter alia, admitted the commission of federal crimes (387, 595, 680-684), was corroborated by similar references to "tear gas guns" in the report prepared by Agent Dugan and was made after the co-defendant had already admitted his guilt to the agents and cooperated with them in effecting appellant's arrest. Thus, when he made the statements, Johnson had every reason to be candid with the prosecutor and to convince her of his truthfulness.* Moreover, it was the Government who had insured Johnson's unavailability, depriving both sides of his obviously relevant testimony. While the district court held that Rule 804(b)(3) of the Federal Rules of Evidence, as interpreted in United States v. Guillette, 547 F.2d 743, 754 (2d Cir. 1976), precluded the statements' admissibility, this hearsay rule should not have barred the testimony. The

*The statements were at least as reliable as the double hearsay testimony permitted in United States v. Medico, 557 F.2d 309, 315-316 (2d Cir. 1977).

evidence was critical to appellant Morici's defense.

In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Chambers v. Mississippi, supra,
410 U.S. at 302.

The prosecution is required to disclose exculpatory evidence favorable to the accused, Brady v. Maryland, supra. Without a corresponding right to present this proof to the jurors, that right, as well as the Sixth Amendment right to compulsory process, becomes completely illusory. Here, the district judge's failure to compel the Government to grant Johnson use immunity or to admit his hearsay statements into evidence denied appellant both these essential constitutional safeguards. Accordingly, a new trial is required.

B. The district court improperly recognized Johnson's
claim of his Fifth Amendment privilege against
self-incrimination.

Prior to trial, co-defendant Johnson had pleaded guilty to Count One of the indictment, but had not yet been sentenced. As to the remaining counts of the indictment, the Government had already agreed to their dismissal.* It was defense counsel's position that Johnson had thereby waived his right not to incriminate himself.

Nevertheless, when called to testify in appellant's behalf, Johnson asserted his Fifth Amendment privilege. This claim was not justified in light of the relevant facts, and was improperly recognized by the district judge, over defense objections. See Kastigar v. United States, 406 U.S. 441, 453 (1972) (The privilege's "sole concern is to afford protection against being forced to give testimony leading to the infliction of 'penalties affixed to ... criminal acts'").

Johnson's plea of guilty to Count One waived any Fifth Amendment right as to that crime. United States v. Sanchez,

*These facts distinguish this Court's decision in United States v. Domenech, 476 F.2d 1229, 1231 (2d Cir. 1973). Further, defense counsel in that case "neither asked the judge to direct [the witness] to answer questions or to rule that the privilege was improperly asserted." Id., 476 F.2d at 1231. Moreover, it is significant that the rule in Domenech was neither discussed nor cited in this Court's later decision in United States v. Wilson, 488 F.2d 1231 (2d Cir. 1973), reversed on other grounds, 421 U.S. 309 (1975), which discussed, but did not decide, the issue presented by the facts of this case. Id., 488 F.2d at 1233 n.3.

459 F.2d 100, 103 (2d Cir. 1972) ("If a witness has already pleaded guilty to an offense he may no longer claim the privilege as to that offense"); see also United States v. Sclafani, 487 F.2d 245, 252 (2d Cir.), cert. denied, 414 U.S. 1023 (1973); United States v. Gernie, 252 F.2d 664, 670 (2d Cir.), cert. denied, 356 U.S. 968 (1958).*

With respect to possible violations under state law, Johnson was insulated from prosecution by state authorities by the operation of both state statute and case law. New York Criminal Procedure Law, §§40.20, 40.30, and advisory notes at 106 ("prior federal prosecution will bar a New York prosecution based on the same conduct"); see, e.g., People v. LoCicero, 14 N.Y.2d 374, 251 N.Y.S.2d 953, 200 N.E.2d 622 (1964). As to the remaining counts of the indictment, the remote possibility that they would be pursued was foreclosed by the Government's previous agreement to their dismissal. Finally, if Johnson were concerned that Judge Werker, the sentencing judge, would be unable to disregard Johnson's unimmunized testimony at the sentencing proceeding, Johnson's remedy was to request a different judge for such a purpose. United States v. Wilson, supra, 488 F.2d at 1233; United States v. Patrick, 542 F.2d 381, 391-392 (7th Cir. 1976).

*The Government has previously taken the position that a defendant who enters a guilty plea "could not thereafter claim a Fifth Amendment privilege to avoid testifying about those crimes, even in the absence of the grant of immunity...." See Government's Brief in United States v. Wilson, supra, Docket No. 73-1574-75 at p.6.

Johnson's claim of his Fifth Amendment privilege was not justified in light of the applicable facts. Its recognition by the district judge precluded essential testimony from being presented to the jurors and, in light of other rulings at trial, unfairly allowed the prosecution to determine unilaterally whether Johnson would be called as a witness. The district court's determination of the question was error and requires reversal. Compare United States v. Anglada, 524 F.2d 296, 300 (2d Cir. 1975); United States v. Mechor Moreno, 536 F.2d 1042, 1049-1050 (5th Cir. 1976).

Point III

INSOFAR AS THEY ARE NOT INCOMPATIBLE WITH THE ISSUES RAISED HERE, APPELLANT MORICI ADOPTS THE ARGUMENTS RAISED ON BEHALF OF HIS CO-APPELLANT, GJERDJ KALAJ.

CONCLUSION

For the foregoing reasons, the judgment of the district court must be reversed and a new trial ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

December 12, 1977

I certify that a ^{corrected} copy of this brief ~~has been~~ has been mailed to the United States Attorney for the Southern District of New York.

Jonathan Hilbermann